PUBLIC PROSECUTOR

v.

TAY BEE SENG

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK JC
[PERAK CRIMINAL TRIAL NO. 58-1-92 (87)]
29 NOVEMBER 1992

DANGEROUS DRUGS: Trafficking in heroin - Drugs found in carrier of motor cycle ridden by accused - Motor cycle does not belong to accused but borrowed from his brother - Whether drugs found in physical custody of accused - No finger-print evidence adduced by prosecution - Possession - Whether mere knowledge is sufficient under the law to constitute possession - Struggle between accused and arresting officer - Accused attempted to escape and attempted to throw heroin - Officers in civilian clothes and accused did not know identity of officers - Whether accused justified in putting up struggle - Attempt by accused to escape - Whether conduct lead to irresistible conclusion he had a guilty mind - When more than one inference - Whether inference most favourable to accused should be adopted.

CRIMINAL PROCEDURE: Section 425 of the Criminal Procedure Code - Whether court bound to admit fresh evidence when it appears essential to a just decision of case - Discretionary power of court - Two limbs to s. 425 Criminal Procedure Code.

CAUTIONED STATEMENT: Section 37A(2) Dangerous Drugs Act 1952 - Cautioned statement - Whether prosecution must prove beyond reasonable doubt that statement was made voluntarily without any inducement, threat or promise - Not for defence to prove involuntariness - Whether accused volunteered to give cautioned statement - Parol evidence - Sections 91 and 92 Evidence Act 1950 - Whether officer who recorded statement could give oral evidence to vary or add to cautioned statement - Breach of r. 10 of Police Lock Up Rules 1953.

EVIDENCE: Section 132 Evidence Act 1950 - Witness not excused from answering on ground that answer will criminate himself - Memo tenetur seipsum prodere - Compulsion and protection as envisaged by s. 132 - False evidence - If witnesses by their answers give false evidence - Whether protected by Courts - Section 157 Evidence Act 1950 - Corroboration.

The Accused was charged with trafficking in dangerous drugs, to wit, heroin weighing 107.97 grammes at about 11.15 am on 29 June 1987 at Simpang Jalan Perumahan Kos Rendah, Batu $2^1/_2$, Simpang Road, Taiping, an offence under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 (Act 234) and punishable under s. 39B(2) of the same Act.

Held:

[1] Mere knowledge under the law is not sufficient to constitute possession. It is merely one of the ingredients of possession.

[2] In this case, there was insufficient evidence to show that the Accused had in his custody or under his control the red plastic package and the incriminating drugs in question. Therefore the statutory presumptions under s. 37(d) and (da) of the Dangerous Drugs Act 1952 were also not raised against the Accused.

[3] At the close of the prosecution's case, the court has to decide whether in law, the prosecution had proved a *prima facie* case which if unrebutted would warrant the conviction of the accused. Whatever doubt the Court had after hearing the evidence of the prosecution witness No. 10 must be given to the Accused.

[4] In the circumstances, on all the evidence adduced at the close of the prosecution's case, the Court found that the prosecution had failed to establish a *prima facie* case which if unrebutted would warrant the conviction of the Accused.

[Accused found not guilty. Acquitted and discharged without calling for his defence].

Cases referred to:

Muniandy & Anor v. PP [1973] 1 MLJ 179 FC ***(foll)***
Sabki bin Adin [1978] 1 MLJ 210 ***(refd)***
Datuk Mokhtar bin Hashim & Anor. v. PP [1983] 2 MLJ 232 / [1983] 2 CLJ 10 ***(refd)***
Tan Too Kia v. PP [1980] 2 MLJ 187 ***(refd)***
Ibrahim v. the King [1914] AC 599 ***(refd)***
PP v. Chong Boo See [1988] 1 CLJ 679 ***(refd)***
Mohd. Yusof v. PP [1983] 2 MLJ 167 at p. 169 ***(refd)***
Krishnan v. PP [1981] 2 MLJ 121 / [1982] 1 CLJ 186 ***(refd)***
PP v. Badrulsham bin Baharom [1988] 2 MLJ 585 ***(refd)***
PP v. Mohd. Fuzi bin Wan Teh & Anor. [1989] 2 CLJ 652 ***(foll)***
Rex v. Lim Ah Seng [1932] MLJ 12 ***(refd)***
Ah Mee v. PP [1967] 1 MLJ 220 ***(refd)***
Ramli bin Kechik v. PP [1986] 2 MLJ 33 / [1986] 1 CLJ 308 ***(foll)***

PP v. Phon Nam [1988] 3 MLJ 415/[1989] 1 CLJ 7 ***(foll)***
Cheong See Leong v. PP [1948 - 49] MLJ Supp. 56 ***(refd)***
Rex v. Koh Soon Poh [1935] (Vol. IV) 120 ***(cit)***
PP v. Paneerselvan & Ors. [1991] 1 MLJ 106/[1990] 2 CLJ833 ***(cit)***
PP v. Lim Eng Chye [1979] 1 MLJ 200 ***(refd)***
PP v. Kang Choo Heng & Anor. [1991] 3 CLJ 2574 ***(refd)***
PP v. Chee Kon Fatt [1991] 3 CLJ 2564 ***(refd)***
PP v. Forster Frank Edald Heinrich [1988] 2 MLJ 594/[1987] 2 CLJ 177 ***(refd)***
PP v. Lim Ah Bek (f) [1989] 2 CLJ 1090 ***(refd)***
PP v. Kok Khee [1963] 29 MLJ 362 ***(refd)***
Christie & Anor. v. Leachinsky [1947] All ER 567 ***(foll)***
PP v. Ooi Chun Seng [1991] 1 CLJ 609 ***(foll)***
Matru @ Girish Chandra v. The State of U.P. (AIR) [1971] Sc 1051 at p. 1058 ***(refd)***
PP v. Lai Ah Bee [1974] 2 MLJ 74 ***(refd)***
PP v. Khoo Boo Hock & Anor. [1990] 1 CLJ 971 ***(refd)***
PP v. Kau Joo Huat [1988] 1 SCR 293/[1988] 1 CLJ 477 ***(refd)***
Choo Yoke Choy v. PP (Supreme Court Criminal Appeal No. 05-136 of 1989)/[1992] 4 CLJ 1791 ***(refd)***
PP v. Yuvaraj [1969] 2 MLJ 89 PC ***(refd)***
Ilian & Anor v. PP [1988] 1 MLJ 421 ***(refd)***
Soo Seng Huat v. PP [1968] 1 MLJ 80 ***(refd)***
Chee Chiew Heong v. PP [1981] 2 MLJ 287/[1981] 1 CLJ 43 ***(refd)***
Liow Siow Long v. PP [1970] 1 MLJ 40 ***(refd)***
Tai Chai Keh v. PP [1948-9] MLJ Supp 105 @ p. 108 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 425
Dangerous Drugs Act 1952, ss. 37A(1), (2), (d), 37(d), (da)
Evidence Act 1950, ss. 91, 92, 114(g), 132(2), 157

Other sources referred to:
Encyclopaedia Britannica, 1970 Edn.
Sarkar on Evidence, Twelfth edition p. 222
Stone's Justices' Manual, 79th edition p. 292

For the Public Prosecutor - Zulkifli Bakar, DPP
For the Accused - Gurbachan Singh

JUDGMENT

Hj. Abdul Malik Bin Hj. Ishak JC:
The Accused was charged with trafficking in dangerous drugs, to wit, heroin weighing 107.97 grammes at about 11.15 a.m. on 29 June 1987 at Simpang Jalan Perumahan Kos Rendah, batu $2^1/_2$ Simpang Road, Taiping, Perak, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B(2) of the same Act.

According to the evidence led by the prosecution, on 29 June 1987, at about 8.30 a.m., Acting ASP Khoo Guan Leong (PW5-Khoo, for short) then an officer attached to the Cawangan Anti Dadah, Ipoh received certain information and, without further ado, summoned a team of his men - four in all, including Detective Lance Corporal 56040 Shafie bin Mat (PW6-Shafie, for short), Detective Constable 869821 Mak Leng Seng, Detective Constable 89457 Selvarajah and Detective Constable 689561 Lian Kian Hock, to action.

Having briefed his men as to their respective roles in an ambush he was proposing to conduct at $2^1/_2$ milestone Simpang Road, Taiping, Khoo and his entire team of men proceeded to the scene and arrived there at about 11.15 a.m. Upon arrival, as arranged Khoo and Detective Mak took up positions at point E in sketch plan P9, Shafie waited at point C in sketch plan P9, while both Detective Lian and Detective Selvarajah were deployed to drive a motorcar and ride a motorcycle respectively along the main road (from Simpang to Taiping and vice versa) as shown in sketch plan P9. Both Detective Lian and Detective Selvarajah were directed to ply along that stretch of road to and fro. At about 11.30 a.m. both Khoo and Shafie saw a male person riding a motorcycle approaching the main road. The motorcyclist stopped at point B in sketch plan P9 whereupon Khoo signalled Shafie to move into action. Safie at once took action by approaching the motorcyclist and held the shoulders of the motorcyclist. The motorcyclist at that time was seated astride the motorcycle. Its engine was on. The motorcyclist moved forward when Shafie pounced on him. It was at this time, that Detective Selvarajah while riding a motorcycle charged head on and hit the motorcycle ridden by that male person. The collision caused the motorcyclist to fall off balance and together with Shafie tumbled onto the road. There was a brief struggle between Shafie and the motorcyclist. According to Shafie, the motorcyclist (now identified as the Accused) tried to escape and tried to throw a red plastic package located on the carrier of the motorcycle. At no time did the Accused hold onto the red plastic package.

With the assistance of Khoo, Shafie managed to place the Accused under arrest. Khoo seized the red plastic package (exhibit P5) from the carrier of the Accused's motorcycle and found in it a piece of Chinese newspaper (exhibit P6). Inside exhibit P6 was the offending exhibit

(P7). Khoo later lodged Simpang Report 1546/87 at the police station.

The contents of exhibit P6 i.e. (P7) were, upon analysis by the Government Chemist (PW3) confirmed to be 107.97 grammes of heroin as defined under s. 2 of the Dangerous Drugs Act 1952 and constituted the subject matter of the charge.

The prosecution also called the brothers of the Accused as their witnesses.

Tay Bee Tiam (PW2-Bee Tiam, for short), the younger brother of the Accused admitted being the registered owner of the motorcycle bearing registration number ABG 6846. This fact was also borne out by the evidence of Jariah bte Mohd. Said (PW1-Jariah, for short). Motorcycle ABG 6846 (exhibit P2) was the very same motorcycle that was used by the Accused at the time of his arrest. Bee Tiam also said that by June 1987 motorcycle (exhibit P2) was no longer in his possession as it was seized by the police.

According to Bee Tiam before 29 June 1987 the Accused used to borrow his motorcycle (exhibit P2) (hereinafter referred to as "the said motorcycle"). On the day in question (29 June 1987) the said motorcycle was first used by Bee Tiam at about 7.00 a.m. and this was followed by the Accused who used the said motorcycle at about 9.00 a.m. to send his pregnant wife to the hospital for a checkup. And that Bee Tiam would not know if the Accused were to use the said motorcycle on 29 June 1987 for some other purpose. Bee Tiam also testified that he had another brother by the name of Tay Bee Chye.

On being recalled by the prosecution, Bee Tiam categorically stated that:

(1) On 29 June 1987 the said motorcycle was in good condition when it was borrowed by the Accused - unlike the present condition of the said motorcycle as tendered in Court;

(2) Before allowing the Accused to borrow the said motorcycle Bee Tiam did not examine the condition of the said motorcycle;

(3) After Tay Bee Chye (the other brother of Bee Tiam) had used and returned the said motorcycle on 29 June 1987 to Bee Tiam, the latter did not check the said motorcycle. It was after this that the said motorcycle was borrowed by the Accused. Thus, we have evidence that Tay Bee Chye used the said motorcycle immediately before the Accused did;

(4) When the Accused borrowed the said motorcycle, Bee Tiam did not leave anything on the said motorcycle;

(5) He had never seen the red plastic package exhibit P5 with its contents (exhibit P6 & P7) nor did he put them on the said motorcycle.

Tay Bee Chye (PW10-Bee Chye, for short) the elder brother of Bee Tiam and consequently the brother of the Accused gave evidence with some character added to it.

Bee Chye testified that the said motorcycle belonged to Bee Tiam. On 29 June 1987 Bee Chye confirmed that he used the said motorcycle and thereafter left it at the five foot way of his house. When confronted by the learned Deputy in regard to the red plastic package (exhibit P5), a piece of Chinese newspaper (exhibit P6) and the offending exhibit (Exhibit P7) Bee Chye went silent. There was a pause before Bee Chye reluctantly stated that he used to see exhibits P5, P6 and P7 (disepit - tucked in between) the said motorcycle. Bee Chye cautiously mentioned that he could not explain who had put exhibits P5, P6 and P7 on the said motorcycle. Bee Chye further stated that before this he had never seen exhibits P5, P6 and P7 but nevertheless he had seen things similar to exhibits P5, P6 and P7. Bee Chye also stated that he did not open exhibits P5, P6 and P7 when they were placed on the said motorcycle. Again when questioned by the learned Deputy Bee Chye stated that on the day in question (29 June 1987) he saw exhibits P5, P6 and P7. Bee Chye also stated that before he used the said motorcycle, Bee Tiam had used it.

Under cross-examination Bee Chye categorically stated that he was afraid while giving evidence in relation to exhibits P5, P6 and P7. Bee Chye voiced his fear of the police. He was frightened that the police might arrest him. Bee Chye further stated that there was a strong possibility that if he were to tell the truth the police might arrest him outside the Court precinct. However, Bee Chye waived and said that he was willing to tell the truth if the police would not arrest him.

Clearly therefore Bee Chye had while giving evidence shown great reluctance and refusal to answer pertinent questions of the learned Deputy in regard to exhibits P5, P6 and P7.

Again Bee Chye in cross-examination expressed in no uncertain terms fear of answering questions regarding exhibits P5, P6 and P7. On the part of Bee Chye, it was a pure exhibition of fear all the way while giving his evidence in the witness box as a prosecution witness. Thus, under the circumstances the Court had to invoke the provisions of s. 132 of the Evidence Act into play. Section 132 of the Evidence Act clearly provides that a witness shall not be excused from answering any question as to any relevant matter in issue, on the ground that the answer to such question will criminate him. The Court then explained to Bee Chye the meaning of subsection (2) in great detail. Subsection (2) of s. 132 of the Evidence Act reads thus:

> (2) No answer which a witness shall be compelled by the Court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

Bee Chye was reassured by the Court that no harm would come to him from telling the truth, even if it incriminated himself (see the guidelines as set out in *Muniandy & Anor v. PP* [1973] 1 MLJ 179 FC).

The maxim: *memo tenetur seipsum prodere* (no one is bound to criminate himself and to place himself in peril) except when compelled by the Court. The compulsion and subsequent protection as envisaged in s. 132 of the Evidence Act would simply mean this:

> witnesses are encouraged to come forward and tell the truth and in the course of it help in the administration of justice. However if the witnesses by their answers were to give false evidence, they are not protected by the Courts.

On being reassured by the Courts Bee Chye was again cross examined by the defence. This time round Bee Chye admitted that it was he who put exhibits P5, P6 and P7 on the carrier of the said motorcycle. Bee Chye also admitted being convicted at Klang Session's Court for an offence under s. 39A of the Dangerous Drugs Act in regard to 81.25 grammes of heroin and 7.65 grammes of morphine. Bee Chye was sentenced to three years imprisonment and ordered to receive 6 strokes of the rattan. He has since served his sentence at Taiping Prisons. Bee Chye admitted that he was convicted for testing positive in a urine test and was bound over by the Court in the sum of RM1,000. Currently Bee Chye faces yet another charge in the Magistrate's Court No. 2 at Taiping for possession of 1 straw tube of heroin (exhibit D13). Bee Chye also stated that the police did not record his statement in regard to the present trial. Lastly under cross-examination Bee Chye categorically stated that what he had told the Court was the truth.

Under re-examination Bee Chye stood firm on his ground. Bee Chye stated that he knew exhibits P5, P6 and P7 contained one pound of heroin. Bee Chye also stated that he placed exhibits P5, P6 and P7 on the carrier of the said motorcycle with the sole purpose of transporting it elsewhere. Bee Chye was aware that being in possession of one pound of heroin was wrong and would attract the death penalty.

In a nutshell, the prosecution's story shows that the offending exhibit belongs to Bee Chye and not the Accused.

Undaunted, the learned Deputy sought to introduce the cautioned statement of the Accused. Defence Counsel objected to the statement being used as evidence at the trial. In view of the objection, the Court ordered that a trial within a trial be held to determine whether the cautioned statement was admissible as evidence (see *Sabki bin Adin* [1978] 1 MLJ 210).

It must be stressed that whether the cautioned statement sought to be admitted appears to the Court to be voluntarily made depends on the facts of each case. No two cases are the same. Invariably it is a pure question of fact which the Court in each case has to determine.

It is trite law that the prosecution must prove beyond reasonable doubt that the cautioned statement was made voluntarily without any inducement, threat or promise (see *Datuk Mokhtar bin Hashim & Anor. v. PP* [1983] 2 MLJ 232). And since "voluntariness being in issue" it was therefore up to the prosecution to prove beyond reasonable doubt that it was voluntary (see *Tan Too Kia v. PP* [1980] 2 MLJ 187). It is also recognised that it is not for the defence to prove involuntariness (see *Ibrahim v. the King* [1914] AC 599) and *PP v. Chong Boo See* [1988] 1 CLJ 679).

The proviso to s. 37A(1) enacts that no such statement shall be admissible if the making of the statement **appears** to the Court to be caused by any inducement, threat or promise. If there is the slightest doubt or suspicion about its voluntary nature, the scale of justice will be turned in favour of the Accused.

Syed Agil Barakbah J. (as he then was) in the case of *Mohd. Yusof v. PP* [1983] 2 MLJ 167 at p. 169 had this to say:

> The word "appears" indicates a lesser degree of probability than 'proved' as defined in s. 3. A well-grounded suspicion based on the facts and surrounding circumstances may exclude a confession. Since proof of inducement or threat is difficult and in many cases impossible of attainment at that stage, the discretion of the Court is unfettered by the concrete standard of proof necessary in other cases. The Court is therefore free to scrutinize the evidence and surrounding circumstances to determine the presence or absence of any threat or inducement, its sufficiency and how it worked in the mind of the Accused. (see **Sarkar on Evidence**, Twelfth edition p. 222).

The recorder of the cautioned statement was Inspector Syed Talib bin Syed Abu Bakar (BDB SP2). He stated that he spoke to the Accused in Bahasa Malaysia through an intermediary, one WPC Tan Ah Nya (BDB SP3). WPC Tan spoke to the Accused in Hokkien dialect and then interpreted it into Bahasa Malaysia for the benefit of Inspector Syed Talib. The cautioned statement was typewritten in Bahasa Malaysia.

In regard to the caution, according to Inspector Syed Talib it was read to the Accused in Bahasa Malaysia while WPC Tan interpreted it to the Accused in the Hokkien dialect. Both Inspector Syed Talib and WPC Tan stated that the Accused was not handcuffed during the recording of the cautioned statement. Inspector Syed Talib further stated that the demeanour of the Accused at the material time to be "tenang, sihat dan dalam keadaan baik", while WPC Tan echoed the same sentiment, *viz* "dalam keadaan normal, tenang". WPC Tan further stated that she was satisfied that the Accused could understand her spoken Hokkien. And conversely the Accused's spoken Hokkien was also understood by her. More importantly Inspector Syed Talib categorically stated that he read the caution twice to the Accused. But WPC Tan did not seem to support him on this score. Inspector Syed Talib agreed that he did not enquire as to whether the Accused had his lunch before recording the cautioned statement.

When confronted by the defence pertaining to the comma that appeared after the word **tidak** in ID14, Inspector Syed Talib explained that he installed the comma on the very day after completing recording the cautioned statement (that was on 29 June 1987). The defence further confronted Inspector Syed Talib with a copy of ID14, i.e. ID14A wherein a comma existed after the word **boleh**. A copy of the cautioned statement (ID14B) sent to Tetuan Ching Yoong Fee (ID14C) was shown to Inspector Syed Talib by the defence. In ID14B no comma appears after the words **tidak** and **boleh**. According to ID14C, ID14B was posted on 2 March 1988 to Tetuan Ching Yoong Fee. Inspector Syed Talib agreed that any amendment to the cautioned statement must be initialled. Inspector Syed Talib further testified that on being enquired the Accused stated that no one directed him to give a cautioned statement.

The leader of the ambush party, Khoo (BDB SP4) also gave evidence in the trial within the trial. Khoo described in vivid detail the manner of arresting the Accused especially that part where there was a struggle between Shafie and the Accused and consequently the Accused incurred some injury on his hand. When the Accused was later brought to Taiping police station, in particular, the operations room, according to Khoo the Accused was given some toasted bread and water. At 1.15 p.m. when the Accused was handed over to the investigating officer ASP Ahmad bin Megat Hussain (BDB SP1), the latter could not detect any injury on the person of the Accused. Even Inspector Syed Talib did not notice the injury on the Accused's hand when he recorded the cautioned statement of the Accused. However, when the Accused was put in the lock-up on 29 June 1987 at about 1.55 p.m. by Corporal 46142 Abdullah bin Mohd. Yusof (BDB SP5) the said Corporal made some remarks on the Buku Catatan Harian Balai (exhibit P16).

In exhibit P16 the injury of the Accused was noted to be "kesan calar di tangan".

Three days after the trial within the trial, the Court requested to see the purported cautioned statement (ID14) together with ID14A

and ID14B. (see *Krishnan v. PP* [1981] 2 MLJ 121, *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585). On perusal of ID14, the following defects were noted:

1. It did not show that the caution was read twice as alleged by Inspector Syed Talib;
2. It did not show nor reflect that the caution was explained to the Accused;
3. It did not record the fact that the spoken Hokkien of WPC Tan was understood by the Accused. And conversely neither did ID14 state that the Accused's spoken Hokkien could be understood by WPC Tan;
4. It did not show that at the time of recording the cautioned statement the Accused was not handcuffed;
5. It also did not itemise the demeanour of the Accused while his cautioned statement was being recorded. That the Accused was "tenang, sihat dan dalam keadaan baik" and "dalam keadaan normal, tenang" was not recorded in ID14;
6. In regard to the caution, there was a comma after the word **tidak** in ID14 without any initial to support it;
7. The words "lebih kurang 2115 hours" were typewritten in ID14;
8. There was cross-examination of the Accused by the recorder in ID14.

The Court ruled the caution that was typed on ID14 was not explained to the Accused by Inspector Syed Talib nor by WPC Tan. It's efficacy to say the least is at its lowest ebb. The caution should be administered and not read to the Accused (see *PP v. Mohd. Fuzi bin Wan Teh & Anor.* [1989] 2 CLJ 652). In all probability the caution was typed on ID14 but not administered nor explained to him. Inspector Syed Talib stated that he could not remember reading the provisions of s. 37A(2) of the Dangerous Drugs Act to the Accused. Now subsection (2) of s. 37A of the Dangerous Drugs Act reads thus:

> (2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies **shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him**.

The Court cannot speculate what would be the reaction of the Accused had subsection (2) of s. 37A been read to him, as this was not done. However, there was evidence during the trial within the trial that the Accused did not volunteer to give the cautioned statement. This piece of evidence came from ASP Ahmad bin Megat Hussain (BDB SP1) who had earlier on directed Inspector Syed Talib to record the cautioned statement of the Accused. It would therefore not be unreasonable for the Court to deduce favourably for the Accused that he would not give the statement had the provisions of subsection (2) of s. 37A been read to him. In order to render the cautioned statement to be admissible in evidence, it must be volunteered, not merely voluntary (see *Rex v. Lim Ah Seng* [1932] MLJ 12).

Whatever was said orally by Inspector Syed Talib and WPC Tan that run counter to ID14 would attract the provisions of ss. 91 and 92 of the Evidence Ordinance. Section 91 of the Evidence Ordinance applies to criminal trials, and it categorically states that

> ... in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of the matter except the document itself ... .

The purported cautioned statement (ID14) was reduced into writing (typewritten) after the arrest of the Accused under s. 37A(b) of the Dangerous Drugs Act and s. 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary or add to what was set out in writing (ID14). (see *Ah Mee v. PP* [1967] 1 MLJ 220). Hence, whatever oral evidence which Inspector Syed Talib and WPC Tan gave during the trial within the trial to contradict or vary or add to ID14 would in the circumstances be an afterthought, an embellishment so to speak to strengthen their evidence.

The credibility of Inspector Syed Talib was at stake when the defence cross-examined him at length in regard to the comma after the word **tidak** in ID14 (that was not initialled by the said Inspector), and in regard to the comma after the word **boleh** in ID14A. Again in ID14B where there was an absence of a comma after the words **tidak** and **boleh**. Now ID14B was posted to a law firm that represented the Accused. Posting was done on 2 March 1988 on the strength of ID14C. ID14C was a letter from the District Police Headquarters at Taiping. It can safely be inferred that on 2 March 1988 ID14 and ID14A were without commas after

the words **tidak** and **boleh**. Thus, when Inspector Syed Talib stated under cross-examination that he placed the comma after the word **tidak** in ID14 immediately after completion of the recording, it was plainly an exercise to embellish the prosecution's case.

According to Inspector Syed Talib he recorded the cautioned statement in narrative form as interpreted by WPC Tan. The latter likewise stated that she did not omit or add anything while interpreting to Inspector Syed Talib. However, a check on the purported cautioned statement (ID14) reveals "2115 hours" for 9.15 p.m. Inspector Syed Talib stated that he typed 2115 hours and it was not what the Accused said. The Court could not help but wonder whether the rest of the contents of ID14 were the words of Inspector Syed Talib and not the words of the Accused. Again in the purported cautioned statement (ID14) there were 13 questions posed by Inspector Syed Talib to the Accused. These 13 questions were in the nature of cross-examination. **Stone's Justices' Manual**, 79th edition p. 292 stated in no uncertain terms the following:

> A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

From the buku catatan harian balai (exhibit P16) the Accused was placed in the lock-up of Taiping police station on 29 June 1987 at 1.55 p.m. Nothing was recorded in exhibit (P16) to show that the Accused had his lunch except for what Acting ASP Khoo had said. What was alleged to be fed to the Accused by Khoo was toasted bread and water. No evidence was led as to the lunch period at the lockup either. Again we have evidence that the Accused was injured in the scuffle with Shafie earlier in the day. Thus, hunger and physical injury would certainly put tremendous physical and mental pressure on the Accused in order to compel him to make a statement. To aggravate matters further there was also a violation of r. 10 of the Police Lock Up Rules which states:

> 10. *Medical inspection on admission.*
>
> The Medical officer shall so far as possible examine every prisoner as soon as possible after admission to a lock up and shall certify whether the prisoner is fit for imprisonment and, if convicted, the class of labour which he can perform.

For the reasons adumbrated above, the Court entertained grave doubts on the voluntariness of the purported cautioned statement and in that event the Court held that the statement ID14 was inadmissible.

Immediately on the resumption of the main trial, the learned Deputy made an application to recall Khoo. The learned Deputy stated that he wanted to put in the oral confession of the Accused through Khoo. The defence Counsel strenuously objected to the said application on the following grounds:

(1) Khoo had earlier given his evidence in the main trial without a single hint of any oral confession purportedly made by the Accused;
(2) Khoo also gave evidence in the trial within the trial to determine the admissibility of the purported cautioned statement of the Accused;
(3) Khoo was present in Court during the entire proceeding;
(4) If there was in fact an oral confession purportedly made by the Accused it should have been brought up at the first instance when Khoo for the first time took his stand in the witness box - a clear case of an afterthought;
(5) The application of the learned Deputy was "unique" in that this was the first time such a method was adopted by the prosecution;
(6) Section 425 of the Criminal Procedure Code cannot be relied upon by the prosecution to make emergency repairs to their case;
(7) Section 425 of the Criminal Procedure Code had never been applied by the prosecution in this sort of "unique" situation.

In rebuttal, the learned Deputy urged the Court, in the interest of justice and for the just decision of the case to allow the prosecution to recall Khoo. The learned Deputy conceded that his application was "unique" but nevertheless stressed that the evidence of Khoo was in

relation to a new subject that was never brought up before. Khoo was not asked in regard to the oral confession and thus he did not say anything. What was not asked cannot be said to be an afterthought, so submitted the learned Deputy.

Section 425 of the Criminal Procedure Code states:

> Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

There are two limbs to s. 425 of the Criminal Procedure Code. The second limb would be relevant to the learned Deputy's application.

In *Ramli bin Kechik v. PP* [1986] 2 MLJ 33 the Supreme Court held (per Mohamed Azmi SCJ):

> By its very nature the discretion to be exercised under s. 425 Criminal Procedure Code depends on the facts of each case - the main consideration being the essentiality of the additional evidence to a just decision of the case. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the Court would be justified in exercising its discretion in calling for additional evidence under this section.

And in *PP v. Phon Nam* [1988] 3 MLJ 415, his Lordship Abdul Hamid Ag. LP (as he then was) followed the decision of *Ramli bin Kechik v. PP (supra)* and said:

> The Court is bound to admit fresh evidence under s. 425 of the Criminal Procedure Code when it appears essential to a just decision of the case. As the powers under this section are very wide it is therefore necessary that great care be taken when exercising such discretion. However, the second limb of the section being an imperative provision the Court must give serious consideration to exercising such powers if in so doing a just and proper decision could be arrived at.

This Court following the guidelines set out by the decisions of the Supreme Court and using its discretionary power allowed the learned Deputy's application to recall Khoo.

On being recalled Khoo testified that on 29 June 1987 at about 11.15 a.m. after the Accused was arrested and handcuffed at the scene of the crime, Khoo spoke to the Accused in Bahasa Malaysia and administered the caution to the Accused. Khoo sought the assistance of DPC Lien Kia Hock (BDBL SP2 - DPC Lien, for short) to interpret the caution in Hokkien dialect. Subsequently, Khoo asked the Accused a single question after showing him exhibits P5, P6 and P7 and the Accused was said to have given an answer. The defence objected to the answer of the Accused being admitted on the ground that no proper caution had been administered or that the oral statement was made involuntarily or that there was no such reply from the Accused. After a trial-within-a-trial was conducted, the Court ruled that the oral statement made by the Accused was inadmissible for the following reasons:

(1) The caution allegedly administered by Khoo was based entirely on his memory. Khoo gave evidence on 17 November 1992 and he was testing his memory to recollect an event that happened 5 years 4 months and 18 days ago. Inherently incredible. The caution was not reduced in writing. The Simpang Report 1546/87 lodged by Khoo did not incorporate the caution and the oral reply of the Accused. Khoo agreed that he did not even record the alleged caution and the reply by the Accused any where - be it in his pocket book or official book. There was no written document signifying that the Accused acknowledged the caution, for example the Accused's signature.

(2) DPC Lien who acted as an interpreter agreed that he too did not record in his pocket diary in regard to the purported caution and the reply of the Accused. DPC Lien also agreed that he did not lodge a police report regarding the oral confession of the Accused. Just like Khoo DPC Lien relied entirely on his memory for an event that took place 5 years 4 months and 18 days ago. A long span of time.

(3) DPC Lien never gave evidence as to the questions that Khoo posed to the Accused nor did DPC Lien testify that he interpreted those questions. In that event, how could the Accused give an answer without the question being interpreted.

(4) Khoo spoke in Bahasa Malaysia to the Accused, DPC Lien interpreted it to the Accused in the Hokkien dialect. Thus, according to the evidence Khoo asked the Accused in Bahasa Malaysia as follows:

Apa bangsa kamu?

Accused replied:

Hokkien.

Khoo then purportedly read the caution to the Accused in Bahasa Malaysia which in turn was interpreted by DPC Lien to the Accused in Hokkien dialect. Khoo then showed exhibits P5, P6 and P7 to the Accused and asked:

Apakah bungkusan ini mengandongi?

The Accused replied surprisingly in Cantonese dialect:

Pak fun.

Khoo understood "Pak fun" to mean heroin without the benefit of DPC Lien's interpretation. DPC Lien on the other hand stated that he interpreted the meaning of "Pak fun" to Khoo.

It would therefore be apparent from a brief recital of the facts that there was no evidence on record to show that DPC Lien knew the Cantonese dialect.

(5) At the time when the alleged caution was read to him, the Accused was already handcuffed. And throughout the questioning session, the handcuff was still utilised on the Accused. By implication it would mean that the Accused was under threat to make the oral statement. To confound the situation further, the Accused was also injured during the scuffle with Shafie. It cannot therefore be said that by any stretch of the imagination that the Accused, injured and handcuffed, would make a voluntary oral statement.

(6) That the purported caution was administered not by an independent officer but by an officer who was personally involved in the ambush. In fact that officer (Khoo) was the leader of the ambush party. So was DPC Lien, a member of the ambush party. There was therefore a strong likelihood of bias present in the instant case. DPC Lien being a member of the raiding party should not have acted as an interpreter as it "offended against the elementary ideas of justice". (see *Cheong See Leong v. PP* [1948 - 49] MLJ Supp. 56).

One point needs to be made.

The learned Deputy in the course of the trial-within-a-trial to determine the admissibility of the oral statement of the Accused sought to lead evidence under s. 157 of the Evidence Act through Khoo, DPC Lien and the investigating officer of the case, ASP Ahmad bin Megat Hussain (BDBL SP3), that the purported caution and the reply of the Accused were recorded from Khoo under s. 112 of the Criminal Procedure Code on 29 June 1987 at 3.30 p.m. and were recorded from DPC Lien under s. 112 of the Criminal Procedure Code on 2 July 1987 at 12.00 p.m. Both statements of Khoo and DPC Lien under s. 112 of the Criminal Procedure Code were recorded by ASP Ahmad.

The learned Deputy cited *Rex v. Koh Soon Poh* [1935] (Vol. IV) 120 and argued that there was no need to tender the s. 112 statements of Khoo and DPC Lien but he wanted to go on record that the corroboration of these two witnesses could be found in their statements recorded under s. 112 of the Criminal Procedure Code.

The defence cited *PP v. Paneerselvan & Ors.* [1991] 1 MLJ 106 and argued that statements coming under the ambit of s. 157 of the Evidence Act must be statements made by the witnesses concerned, namely, Khoo and DPC Lien. It cannot be in relation to statements made to and recorded by someone else, like the statements under s. 112 of the Criminal Procedure Code.

The two cases cited by both parties are poles apart from the instant case. In these two cases, what was sought to be introduced were statements written by the witnesses themselves. And in these two cases, it did not involve s. 112 CPC statements.

In *Rex v. Koh Soon Poh (supra)* the note book (exhibit G) kept at the time of the transactions by Lim Thai Hock was admitted under s. 157 of the Evidence Ordinance as corroborating Lim Thai Hock's parole testimony.

In *PP v. Paneerselvan & Ors. (supra)* certain statements which took the form of entries in 14 pages torn from an exercise book and corre-

sponding entries in summary form, in a pocket note book made by Corporal Lian Kian Hock (PW4) were held to be relevant and technically admissible as they satisfy the conditions laid down in s. 157 of the Evidence Act 1950. But since the prejudicial effect of those statements far outweighed its probative value, his Lordship Edgar Joseph Jr. J. (as he then was), excluded them as corroboration under s. 157 of the Evidence Act 1950.

Section 157 of the Evidence Act 1950 reads as follows:

> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

The words "any former statement made by him" would necessarily mean that s. 157 of the Evidence Act 1950 cannot be invoked to let in statements made by somebody else for corroborating a witness examined in the case. The s. 112 statements of Khoo and DPC Lien were clearly made by ACP Ahmad (the investigating officer) and hence inadmissible under s. 157 of the Evidence Act 1950.

With the exclusion of the cautioned statement and the oral confession, the case for the prosecution had to stand or fall on the evidence that had been adduced outside the trial within the trial.

The prosecution, through its witnesses adduced evidence that the Accused was arrested while riding the said motorcycle carrying the offending exhibits (exhibits P5, P6 and P7) neatly tucked on the carrier of the motorcycle. There was also evidence of a struggle between the Accused and Shafie where the Accused was subsequently subdued and placed under arrest. There was in evidence also that the Accused attempted to escape and attempted to throw a red plastic package (exhibit P5) with its contents (exhibits P6 and P7). Bee Chye, the brother of the Accused, a man of colourful character and attractive criminal record put a different colour entirely on the prosecution's case. Bee Chye admitted ownership of the offending exhibits (exhibits P5, P6 and P7). Bee Chye admitted that he placed the offending exhibits on the said motorcycle to be transported elsewhere.

An appraisal of the prosecution's story would show a number of impediments.

Firstly, the Accused was not the registered owner of the said motorcycle and the drugs (the offending exhibits) were not found in the physical custody of the Accused. The Accused never touched but merely attempted to touch the offending exhibits. No evidence was led that fingerprints were lifted from the red plastic package (exhibit P5), the piece of Chinese newspaper (exhibit P6) and the plastic bag (exhibit P7) that was used to wrap up the drugs. Fingerprints afford an infallible means of personal identification. It has been said that fingerprints serve to reveal an individual's true identity and that it can be taken with the minimum of time and effort. (Encyclopaedia Britannica, 1970 edition). Courts have consistently emphasised the importance of fingerprint evidence (see *PP v. Lim Eng Chye* [1979] 1 MLJ 200, *PP v. Kang Choo Heng & Anor.* [1991] 3 CLJ 2574, *PP v. Chee Kon Fatt* [1991] 3 CLJ 2564).

Secondly, the investigation also did not show that finger nail clippings or hand swabs were taken from the Accused (*PP v. Forster Frank Edald Heinrich* [1988] 2 MLJ 594, *PP v. Lim Ah Bek (f)* [1989] 2 CLJ 1090). It must be emphasised that in a criminal trial the Court is entitled as of right to the best evidence.

Thirdly, when the police party pounced on the Accused it came without warning. The Accused was suddenly held by the shoulders by Shafie and his motorcycle was knocked into by the motorcycle ridden by DPC Selvarajah. At that time the Accused did not know the identity of these officers. These officers were in civilian clothes. The Accused put up a struggle and it would *prima facie* appear that he was justified in putting up the struggle since he was resisting an illegal or unjustifiable use of force towards him (*PP v. Kok Khee* [1963] 29 MLJ 362).

With due respect to the prosecution, the police party in their haste to nab the Accused failed to identify themselves to the Accused (see the re-examination of Shafie where he stated "saya tidak sempat mengenalkan diri saya kepada YKT sebagai seorang polis sebab hendak mengambil tindakan serta merta dalam keadaan terdesak"). Would the circumstances of this case, especially the admission of Bee

Chye as the sole rightful owner of the drugs, mean that the Accused knew the general nature of the alleged offence he was purported to have committed? The answer would be in the negative. The sage observations of Viscount Simon in *Christie & Anor. v. Leachinsky* [1947] All ER 567 need to be followed:

> If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
>
> If the citizen is not informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.
>
> The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.
>
> The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is one of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that restraint should be imposed.

To be fair to the prosecution, according to Khoo (after being recalled by the prosecution) he introduced himself as a police officer after the Accused had been handcuffed. This was therefore a step in the right direction.

Fourthly, the fact that the Accused tried to escape. The prosecution was capitalising on this aspect. Even assuming that the Accused put up a struggle and attempted to escape, such conduct, without more cannot lead to an irresistible conclusion that he had a guilty mind (see *PP v. Ooi Chun Seng* [1991] 1 CLJ 609 where the decision of the Supreme Court of India in *Matru @ Girish Chandra v. The State of U.P. (AIR)* [1971] Sc 1051 at p. 1058 was referred to).

The prosecution relied on the legal presumptions under ss. 37(d) and 37(da) of the Dangerous Drugs Act 1952.

Suffice it to say that mere knowledge under the law is not sufficient to constitute possession (*PP v. Lai Ah Bee* [1974] 2 MLJ 74 and *PP v. Khoo Boo Hock & Anor.* [1990] 1 CLJ 971). It is merely one of the ingredients of possession. The controversy in regard to the meaning of "possession" has finally been laid to rest by the decision of the Supreme Court in *PP v. Kau Joo Huat* [1988] 1 SCR 293. The Supreme Court has now held that for purposes of possession, it need only be shown that:

(1) the Accused knew the nature of the thing possessed; and
(2) the Accused was conscious of his possession of the thing.

The Supreme Court in *Choo Yoke Choy v. PP* (Supreme Court Criminal Appeal No. 05-136 of 1989) has recently held that "without the evidence of custody or control, the presumption of possession under s. 37(d) of the Act cannot arise".

It must be borne in mind that the two presumptions relied upon by the prosecution are rebuttable. They can be rebutted on the balance of probabilities (*PP v. Yuvaraj* [1969] 2 MLJ 89 PC, *Ilian & Anor v. PP* [1988] 1 MLJ 421) and they can also be rebutted from the evidence adduced by the prosecution. (*Soo Seng Huat v. PP* [1968] 1 MLJ 80, *Chee Chiew Heong v. PP* [1981] 2 MLJ 287).

Consequently, the Court found that there was insufficient evidence to show that the Accused had in his custody or under his control the red plastic package and the incriminating drugs in question. Therefore the statutory presumptions under ss. 37(d) and (da) were also not raised against the Accused.

Even if the two presumptions were applicable the Court was of the view that the admission of Bee Chye as to the ownership of the offending exhibits (exhibits P5, P6 and P7) would enable the defence to rebut the presumptions under ss. 37(d) and 37(da) of the Dangerous Drugs Act.

The learned Deputy in a last minute bid to salvage his sinking ship submitted that the Court should reject the evidence of Bee Chye totally. In retrospect, the prosecution had no choice but to call Bee Chye for fear of and to avoid the invocation of s. 114(g) of the Evidence Act. Once Bee Chye was called he remained throughout a prosecution witness, wearing the

SII HING KUNG & ANOR

v.

DAVID T.M. TING

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG JC
[CIVIL SUIT NO. 94 OF 1986]
12 JUNE 1992

PRACTICE AND PROCEDURE: Want of prosecution - Application by defendant to dismiss the plaintiff's action for want of prosecution - Intentional and contumelious default - Inordinate and inexcusable delay on the part of plaintiffs or their Advocates to prosecute action - Whether such delay will give rise to substantial risk that it is not possible to have a fair trial - Prejudicial to defendants.

This was an application by the defendant to dismiss the plaintiffs' action for want of prosecution on the grounds that:

(1) that there has been intentional and contumelious default on the part of the plaintiffs or the advocates and, or

(2) that there has been inordinate and inexcusable delay on the part of the plaintiffs or their advocates to prosecute this action and such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in this action or is such as is likely to cause or to have caused serious prejudice to the defendant. The plaintiffs' claim against the defendant was for damages for professional negligence allegedly committed during the period between 31 January 1985 to 7 February 1985.

Held:

[1] On the evidence, circumstances and the reasons given, the defendant has succeeded in establishing that there has been inordinate and inexcusable delay on the part of the plaintiffs' solicitors. As a result, such delay will give rise to a substantial risk where it is not possible to have a fair trial of the issues in the action or is such as is likely to cause serious prejudice to the defendant as between the defendant and the plaintiffs.

[Plaintiffs' action dismissed with costs for want of prosecution].